

**MINUTES**  
**INSOLVENCY LAW COMMITTEE**  
**OF THE BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA**

**January 28, 2005**

The regularly scheduled meeting of the Insolvency Law Committee of the Business Law Section of the State Bar of California was held on January 28, 2005, at the offices of Wendel Rosen Black & Dean in Oakland, California. The following members attended the meeting in person (either at Wendel Rosen's office or at the satellite site at Procopio Cory Hargreaves & Savitch LLP in San Diego, California) or by telephone:

Peter Bronson  
Molly Baier  
Elizabeth Berke-Dreyfuss  
Mike Buckley  
Sharon Dutton  
Lisa Fenning  
Robert Franklin  
Barry Glaser  
Eve Karasik  
Michael Koch  
Howard Kollitz  
Malhar Pagay  
Donna Parkinson  
Paul Pascuzzi

Maria Pum  
Daniel Schechter  
David Shemano  
Clifford Stevens  
Edward Tredinnick  
Colin Wied  
Mary Jo Wiggins  
Craig Wolfe

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Russell Clementson (Ex Officio)  
Sandy Lavigna

The following members did not attend the meeting with advance notice: Mark Porter and Rob Harris (Ex Comm Liaison).

Peter Bronson called the meeting to order at approximately 10:00 a.m.

**1. Approval of Minutes: December 16, 2004.**

The minutes of the December 16, 2004 meeting were approved with corrections.

**2. Membership.**

The Chair reminded the Committee that there are two open seats on the roster and that proposals for candidates to fill the slots should be sent to him. It was noted that for diversity purposes a consumer bankruptcy lawyer would fit well. Applications for next term are due in June. Officer nominations for next year (secretary) are due by May, so any member interested should let Peter or Paul Pascuzzi know.

**3. Meeting Schedule.**

The Chair noted that he will continue with the process of circulating an email to determine who will be attending the meeting and the best location for the satellite sites.

#### **4. Website and Constituency Report.**

##### **A. Web Update.**

Bob Franklin presented a page-by-page review of the Website on-screen at the Oakland location. Bob explained that each member of the subcommittee has been assigned various parts of the website to keep them updated. Bob will be in charge of keeping up to date the Home page, rosters, meeting schedule, links and minutes. Mike Buckley will be in charge of the programs section of the webpage. Eve Karasik will be in charge of the publications section, including the model real estate order. Cliff Stevens will be in charge of the pending legislation section. Maria Pum will be in charge of the new legislation section. The Committee discussed adding the new Northern District ECF requirements to the Home page as a news item. The current Membership Roster is posted and the instructions for use of the Model Real Estate Order are accessible.

##### **B. Constituency Lists/Bankruptcy e-Bulletins.**

The Chair noted that the Committee has sent out seven Bankruptcy e-Bulletins since the last meeting. The Committee thanked Dan Schechter for his analysis of several cases that were the subject of e-Bulletins. All comments in response to the e-bulletins have been positive, including one from former ILC Chair and Ex Comm member, Rhonda Nelson. Paul Pascuzzi suggested that Committee members announce at any county bar section meetings/events that the ILC is sending out the e-Bulletins and explain how to get on the list. This will be a valuable way of obtaining feedback from the bar as well. Committee members are encouraged to send Peter or Paul mini-articles for distribution as an e-Bulletin. In addition, because of Rob Harris' item in the Business Law Section E-News concerning our e-Bulletins, we have obtained approximately 50 more "sign ups" to receive the e-Bulletins. Committee members are also encouraged to provide Peter or Paul with suggestions or material for the E-News (which has to be approved by Ex Comm).

Dan Schechter provided a more current list of bankruptcy professors that might be interested in joining the constituency list for ILC. Peter will draft a letter requesting permission to solicit their interest in being added to our constituency list for e-blasts.

#### **5. Education Subcommittee Report.**

Elizabeth Berke-Dreyfuss reported to the Committee on behalf of the Education Subcommittee.

##### **A. Winter SEI.**

Liz first reported that there are at least 30 sign-ups for the "Bankruptcy 101" program at the Winter SEI. There are typically many walk-ins as well. The panelists are Liz, Judge Leslie Tchaikovsky and Howard Kollitz.

##### **B. State Bar 2005 Annual Meeting.**

Liz reported that she had submitted the three Committee choices for the 2005 Annual Meeting: 1) Family Law and Bankruptcy; 2) a Chapter 13 overview program; and 3) Bankruptcy Taxation (which had been proposed for the Winter SEI and not selected). Each of the programs already have prospects for speakers.

Liz also reported on whether to co-sponsor a program with the Standing Committee on Delivery of Legal Services on how to spot bankruptcy issues. Liz reported that the potential program would not overlap any of the Committee's programs and is expected to be very elementary. Co-sponsoring the program is not expected to affect whether any of ILC's other submissions are selected. Molly Baier made a motion that the Committee co-sponsor the program. The motion passed. Liz will contact Radmila Fulton, a former committee member who is experienced in consumer bankruptcy cases, to be on the panel for the program. Colin Wied suggested others as well if Radmila is unavailable. The Committee will also seek input on the description of the program so that there is no implication that it will be an in-depth examination of bankruptcy issues.

### **C. Other Possible Programs.**

Liz reported that the Bankruptcy Fraud program from the 2004 Annual Meeting is on the State Bar website in the online MCLE section. Liz reported that a live "web-inar" receives the same MCLE credit as a non-live one. There appears to be no reason not to do a live "web-inar" if we are going to do one. The Chair requested that members think about what programs the Committee could produce outside the Annual Meeting and SEI structure. Paul Pascuzzi suggested that any of the programs proposed for the 2005 Annual Meeting that are not selected would be excellent candidates since the topics are picked and potential speakers identified.

## **6. Legislation and Current Projects.**

The Committee turned next to matters related to current legislative projects.

### **A. BLS Standing Committee Guidelines for Legislation.**

The Chair included in the materials for this meeting the guidelines and timelines for Committee action involving legislation. See materials at pages 100-131. The Chair noted the importance for the Committee to get involved early in the process for pending legislation. The Committee discussed the differences and advantages of using the affirmative legislative proposal (ALP) route as opposed to the Conference of Delegates route. It appeared that the ALP route was better. The bottom line is that by the February 25 meeting the Committee should identify any ALPs that are not already in the works for this year so the projects can be completed by May.

### **B. CUFTA.**

Dan Schechter reported on his efforts to expedite the ALP to correct numbering in the California Uniform Fraudulent Transfer Act necessitated by adoption of amendments to California Civil Code Section 3439.01. Previously, Rob Harris suggested that the ALP be drafted and sent by email to Jeff Selman at Heller Ehrman White & McAuliffe for ExComm consideration at ExComm's meeting the following day on December 17, 2004 or as soon thereafter as possible. Dan's efforts to have the matter offered as emergency legislation had not yet been accepted. . The Chair will follow up with Jeff Selman to see if there is anything that can be done to move this along.

### **C. Model Real Estate Order.**

Paul Pascuzzi reported the status of the communications from the Northern District bankruptcy judges on the model order. Paul reported that Ben Young has not heard from the judges since submitting the Committee's comments to their draft sale order. Paul noted that the Northern District

sale order is intended to apply to all bankruptcy sales and the ILC's order is only for real property sales. Paul will continue to monitor this matter and report to the Committee if there is any word from the Northern District.

**D. Attachment Liens.**

The Committee then continued its discussion of Dan Schechter's ALP to amend California Code of Civil Procedure Section 697.070 to address the holding in *Southern California Plastics, Inc.*, 165 F.3d 12443 (9<sup>th</sup> Cir. 1999). To review, in that case, the court held that allowance of a claim in bankruptcy was insufficient to satisfy a necessary judgment requirement for perfection of a California attachment lien; an actual California judgment is required. In order to overcome the procedural problems this holding imposes on plaintiffs who have not obtained a judgment pre-petition, the above ALP proposes to treat the order actually allowing the underlying claim after hearing in bankruptcy (but not claims merely deemed allowed through filing or scheduling without objection) as a judgment for this purpose. The Committee has discussed various alternatives to the ALP such as seeking change for the Ninth Circuit's holding, either through further litigation and scholarly publications or through Congressional action. The Committee's consensus is that the California statutory approach, though not a "whole loaf" from a policy standpoint, was the most expeditious route to give effective relief to litigants burdened by the decision.

Molly Baier will email to the legislation subcommittee her draft revisions to proposed Comment 1 to the draft statute. The subcommittee will work on a final version of the ALP for presentation to the entire Committee at the February 25 meeting.

**E. Perfection of Security Interests in Intellectual Property.**

At the last meeting, Mark Porter raised the question of whether there was any point in pursuing a legislative fix (from Congress) on the uncertainty surrounding perfection of security interests in certain intellectual property. Since Mark was not present at this meeting, the matter was tabled for the next meeting.

**F. Lis Pendens Project.**

At Dan's request, the Committee tabled the lis pendens proposal.

**G. CLRC.**

With regard to the CLRC project on mechanics lien law, Mike Koch reported that the CLRC noted that it would be several meetings before the project was completed. Mike noted that there are many precise amendments that are beyond the scope of the Committee's expertise. The consensus was that Mike should merely monitor the status of this matter. Mark Porter was not present, so any discussion of the Assignment for the Benefit of Creditors project was tabled for the next meeting. Mike discussed the proposal to prevent waivers of privileges by inadvertent disclosure. The topic seemed more appropriate for the Litigation Committee than for this Committee. Mike will circulate the materials to determine if anyone is interested.

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## **H. Sherwood Partners Decision.**

The Committee discussed the recent Ninth Circuit decision in *Sherwood Partners* invalidating the preference recovery provisions of the assignment for the benefit of creditors provisions of the Code of Civil Procedure. The Chair reported that Sherwood would likely be filing a petition for rehearing en banc. Peter was invited to attend a meeting in Los Angeles to discuss the opinion. Either Peter or Lisa Fenning will attend and report to the Committee at the next meeting. The Committee discussed the various arguments for and against whether the decision was a desirable result. The sense was that the Committee lacked a consensus on whether the decision was right or wrong. Thus, it would be difficult for the Committee to do anything such as consider filing an *amicus curiae* brief. The Committee will continue to monitor the progress of the case.

## **I. CCP §§ 697.530 and 708.110 et seq. Secret Liens.**

The Chair reported his continued efforts in working with the UCC Committee to determine what if anything should be done about the enormous list of secret liens. It was decided that all Committee members should consider this issue and be prepared at the next meeting to discuss the matter. In the meantime, the Chair will circulate the list of secret liens.

## **J. State Bills.**

Mike Koch reported no significant movement on bills the Committee has been tracking. Nothing new to report regarding AB 3103, which at last check was still in front of the Assembly Judiciary Committee. Nothing new is known about the efforts to repeal the Bulk Sales Law or plans this year to move it forward. Mike reported that there is a new bill that involves consumer loans. Mike will look at the bill and report to the Committee whether he found anything worthy of Committee examination.

## **K. Federal Bills.**

Mike reported that none of the bills the Committee had watched last year have yet been introduced this year, including the bankruptcy reform legislation. For ease of reference, the following has been taken from the January meeting agenda.

**S1920:** Amending Chapter 12 (as of Dec. mtg. in conference committee).

**HR 4571 (Lawsuit Abuse Reduction Act):** (as of Dec. mtg. had been passed by the House and was referred to a Senate committee.

**HR 4247 and S2278 (Ninth Circuit Split):** (as of Dec. mtg. had been referred to Senate and House committees.

The Committee will keep tracking these bills and watching for the bankruptcy reform legislation to be re-introduced.

## **7. Publications.**

Dave Shemano reported for the Publications Committee. The Annual Legislative Review has been completed by Dan Schechter (case updates) and Mike Koch (legislation). Dave reported that the Business Law News is still looking for articles for the BLN Spring edition that will be devoted to

bankruptcy issues. Dave will be the clearinghouse for any articles submitted by Committee members. The editors are looking for articles on the topic, and already have commitments on 1) purchases of assets in bankruptcy and 2) why Chapter 11 cases are not being filed locally. Topics need not be California specific. Articles should be 2,500 words in length and submitted to him (jmenton@pwk.llp.com) or to Katherine Bowman, the co-editor of this edition, by March 31, 2005. Interested authors can get formatting guides upon request, and publication of accepted articles should occur within one to two months of submission. Dave will check if articles submitted for this special issue count toward the ILC's mandatory article for this year. The Chair noted that he may have a conflict on the scheduled date for the annual officer update (February 18). He will determine whether the date can be moved or whether Paul Pascuzzi or Mark Porter can fill in.

#### **8. Update from ExComm Liaison.**

The Chair noted that due to the conflict of the schedule for the Ex Comm meeting, neither of our Ex Comm liaisons was available at this meeting. The Chair noted that the responses to the questions raised at prior meetings were in the meeting materials at page 97.

#### **9. Bankruptcy Law Advisory Commission.**

The Committee then discussed ongoing efforts to establish better communication with the Bankruptcy Law Advisory Commission following the change in its bankruptcy certification without notice to the Committee or solicitation of its input. Barry Glaser reported that he contacted Wes Avery to attempt to open a dialog, but was referred back to Scott Bovitz. Barry is continuing to follow up.

#### **10. New Business.**

The Chair called for any new business. Molly Baier raised the issue of whether it would be in the Committee's purview to submit an ALP to change the sexist language in California Civil Code 1542 regarding release of unknown claims. The sense from the Committee was that it may be a Litigation Committee issue or better brought through another forum. Molly was encouraged to follow up with the Litigation Committee. It was also suggested that the California Women Lawyers might be interested.

#### **11. Adjournment.**

The meeting was adjourned at approximately 12:15 p.m.

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Paul Pascuzzi, Acting Secretary  
for Secretary Mark Porter